133-579

133-579

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES,

OCTOBER TERM, 1889.

No. 1514

CHARLES A. GREGORY, APPELLANT,

v.

JOHN G. STETSON, APPELLEE.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF MASSACHUSETTS.

FILED ~~OCTOBER~~ Nov 18, 1889.

SUPREME COURT OF THE UNITED STATES,

OCTOBER TERM, 1889.

No.

CHARLES A. GREGORY, APPELLANT,

v.

JOHN G. STETSON, APPELLEE.

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Circuit Court of the United States,

DISTRICT OF MASSACHUSETTS.

IN EQUITY.

No. 2557.

CHARLES A. GREGORY *v.* WILLIAM C. N. SWIFT ET AL.

AMENDED BILL OF COMPLAINT.

[FILED JAN. 30, 1889.]

To the Judges of the Circuit Court of the United States for the District of Massachusetts in the First Circuit sitting in equity:

Charles A. Gregory, of the city of Chicago and State of Illinois, and a citizen of said State of Illinois, brings this his bill of complaint against William C. N. Swift, of New Bedford in the State of Massachusetts, and John G. Stetson, of Boston, in said State, both being citizens of said State of Massachusetts.

And your orator, complaining, shows that on the tenth day of January, A. D. 1887, he brought a bill of complaint in this honorable court against the said Swift and Stetson and one Thomas H. Talbot, a copy of which bill of complaint is annexed to this bill and made part of the same (meaning thereby to incorporate herein so much and so much only of the contents of the said bill of Jan. 10, 1887, as relates to the note of $15,000, below mentioned, and no part of said bill relating solely to the $20,334.60 Swift note so called). And your orator shows that on the eighteenth day of January, 1887, the said Swift filed his answer to said bill, and on the seventh day of February, 1887, the said Stetson filed his answer to said bill, to which answers now on the files of this court reference is hereby made for the contents of the same; and your orator shows that issue was duly joined by him upon both said answers.

And your orator shows that while the said Stetson was in possession of the $15,000 Swift note under and by virtue of the instrument

of Dec. 24, 1886, signed by him, a copy of which, marked "Exhibit 3", is annexed to this bill of complaint and made part of the same, viz., on the thirteenth day of June, 1887, the said Swift filed his petition in the old cause of Gregory *v.* Pike and Swift, being cause numbered 2170 on the equity docket of this court, a copy of which petition is hereto annexed, marked "Exhibit 4", and made part hereof; that on the ninth day of July, 1887, an order entitled in said old cause of Gregory *v.* Pike *et al.* was made and entered in said old cause by the presiding judge of this honorable court, in the words following, to wit: "It is ordered that defendant, Stetson, file the note of $15,000, referred to in the said petition" (meaning the petition of one Mary H. Pike, entitled in said old equity cause No. 2170, filed in said old cause on the twenty-first day of June, 1887, in the name of Mary H. Pike), "in the said action at law No. 2435 of Jones *v.* Swift" (meaning an action numbered 2435 of actions then pending on the law docket of this honorable court); and at the same time the further order was made and entered, as follows, in said old equity case 2170: "that upon the entry of judgment in the said action at law, said Swift be directed to pay into the registry of this court the amount of said judgment (but without commissions by consent of the parties named herein), and that said amount be held subject to the rights of the parties claiming said note, and to abide the decision of the court in this cause" (meaning the old equity cause of Charles A. Gregory *v.* Frederic A. Pike *et al.* above mentioned).

And it was at the same time further ordered in said old cause "that upon the payment by said Swift into the registry of this court of the amount of said judgment an order of satisfaction of said judgment be entered of record".

And your orator shows that in pursuance of and in obedience to the orders so procured by said Swift and so passed in said old cause No. 2170, and by the voluntary action or procurement of said Swift, judgment was entered in said action at law No. 2435 of Jones *v.* Swift, and the $15,000 note of said Swift was delivered up and surrendered by said Stetson, the bailee or depositary thereof, and filed with the papers in said action at law No. 2435, and the amount of said note or judgment was paid by said Swift to the clerk of the said

court, who now claims to hold the same "subject to the rights of the parties claiming said note and to abide the decision of the court" in the old cause in equity of Charles A. Gregory *v.* Frederic A. Pike *et al.*, as provided or set forth in and by the orders aforesaid.

And your orator shows that all these orders were passed and proceedings had without the consent and against the will and after the protest of your orator against the same as irregular, improper and contrary both to law and justice, and without "due process of law".

And your orator shows that he is advised and believes and therefore avers, that at and before the time of the passage of said orders, the old equity cause of himself against Frederic A. Pike and Wm. C. N. Swift, numbered 2170, if not otherwise taken out of court or discontinued, as between himself and the said Pike, had yet become abated by the decease of said Pike on the second day of December, 1886, and by the suggestion of said Pike's death duly made by your orator and entered in said cause on or about the sixth day of January, 1887.

And your orator shows that he had, before the ninth day of July, 1887, become the lawful owner of said $15,000 Swift note and entitled to the benefits of the action at law No. 2435 then pending thereon in this court; and that the court and the said Swift and Stetson had been duly notified by your orator of such his ownership thereof.

And your orator was, by leave of court, permitted to appear and file his petition in said action at law No. 2435, as claimant of said $15,000 Swift note, and to be heard as to such claim, before any entry of judgment in the said action, and he did file such petition, a copy of which is hereto annexed, marked "Exhibit 5".

And your orator is informed and believes that the judgment in said action at law No. 2435 was entered satisfied by the clerk of this honorable court, and that the amount of the $15,000 note was paid over to said Stetson as clerk of this court, and was by him, as such clerk, deposited with the Merchants National Bank of Boston, where it now is; and that said $15,000 note was, by said Stetson, placed on the files of this court, in the old equity suit 2170 above mentioned, where it now is.

And your orator is informed and believes that the said Stetson,

to whom the said note was intrusted, as aforesaid, on the twenty-fourth day of December, 1886, claims to have been duly authorized by the above-recited orders of said court, made July 9, 1887, to deal with said note as above set forth, and to be exempted or protected by said orders of said court from all liability to your orator, under his receipt to your orator, dated Dec. 24, 1886.

And your orator prays that the money so paid by the defendant, Swift, into the hands of the defendant, Stetson, as clerk of this court, in satisfaction of the said $15,000 note, may be remanded to the custody of said Stetson in his individual capacity, as if no such orders, as above recited, had been passed, and in the place and stead of the said $15,000 note, so surrendered by him, and filed with the papers in equity suit No. 2170, in violation of the terms and provisions of the contract entered into by him with your orator as aforesaid, on the twenty-fourth day of December, 1886; and that the said Stetson may be ordered and decreed to pay over the proceeds of said note to your orator; and your orator prays for such other and further relief as he may be entitled to in the premises.

CHARLES A. GREGORY,
by F. A. BROOKS.

F. A. BROOKS,
Solicitor for Plaintiff.

COPY OF BILL FILED JANUARY 10, 1887.

UNITED STATES CIRCUIT COURT,
DISTRICT OF MASSACHUSETTS.

CHARLES A. GREGORY *v.* WILLIAM C. N. SWIFT ET AL.

SUPPLEMENTAL BILL.

Charles A. Gregory, of Chicago, in the county of Cook and State of Illinois, and a citizen of said State of Illinois, having obtained leave of court for this purpose, brings this his bill of complaint in the nature of a supplemental bill against Wm. C. N. Swift, of New Bedford in the State of Massachusetts, and a citizen of said State of Massachusetts, and John G. Stetson, of Boston, in the State

of Massachusetts, and Thomas H. Talbot, of Brookline, Mass., and a citizen of said State of Massachusetts. And your orator, complaining, shows that on or about the sixteenth day of December, 1884, he brought his original bill of complaint against the said Swift and Frederic A. Pike, of Calais, Me., who has recently deceased testate, but no letters testamentary having yet been taken out upon his estate, the executrix named in his will cannot be joined as a party defendant to this suit; and your orator shows that his said suit was in due form of law removed to this honorable court, where the same is now pending and undetermined; that your orator in and by his said original bill sought to obtain the possession and control of two certain notes of hand made by the defendant, Swift, dated April 20, 1883, payable to one Charles F. Jones, one of said notes being for the sum of $15,000 with interest, payable in two years from its date, and one for $20,334.60 with interest, payable in three years from its date, the said notes then being in the hands, possession and control of the said Pike, and praying in and by his said bill that the said Pike be ordered and decreed to surrender or deliver the said notes to your orator, as more fully appears in said original bill of complaint, to which reference is hereby made for greater certainty as to the contents thereof.

And your orator shows that he prosecuted the said original bill in this court, and that the said Pike and the said Swift, defendants therein, filed their respective answers and supplemental answers to the same, upon which issues were duly joined and proofs taken and the case set down for final hearing, and a day assigned for such final hearing, viz., the twenty-ninth day of November last, but that said bill was not heard on that day, but such hearing was postponed.

That thereupon it was agreed in writing between the said Pike and your orator that the said suit and all the matters in controversy between them should be referred to the Hon. E. R. Hoar, with power to determine as between them as to the true ownership and rights of possession of the notes above mentioned, and to make his award of and concerning the same; and the said two notes were delivered into the manual possession and control of the said Hoar with power to pass over the same to whichever of the two parties should, in his judgment, be entitled thereto; and it was agreed by and between the said parties to said submission that the same was entered into upon a valuable consideration, and that in case of the death of either or both of them, their respective legal representatives, heirs and assigns should be bound and concluded thereby and by the award to be made in the premises by the arbitrator aforesaid; and soon after they had entered into the said submission, the said Pike deceased testate, having appointed his wife, Mary H. Pike, of Calais, Me., the executrix of his will, and also made her the residuary legatee of all his property or estate; and the said Mary H. Pike was forthwith notified of the fact of the said submission entered

into as aforesaid by the testator in his lifetime, and she appeared by counsel before the arbitrator and proceeded with the hearing under said submission by Thomas H. Talbot, Esq., as her attorney, and was by him represented at the hearing before the arbitrator under the said submission in the same manner and with the same purpose and effect as if the submission had been made or entered into by her personally; and the arbitrator, after duly hearing the parties under said submission, made and published his award in writing, dated as of the day of the date of the submission, viz., on the thirtieth day of November, A. D. 1886, and delivered the same to your orator on the same day, to wit, on the twentieth day of December last, a copy of which award and also of said submission is hereto annexed, marked respectively "Exhibit 1" and "Exhibit 2".

And your orator shows that the findings or determinations of the said arbitrator had before that day, viz., on the eighteenth day of December last, been communicated orally to your orator and the said Mary H. Pike, executrix as aforesaid, both of whom attended before the arbitrator to receive such communication at that time, your orator in person, and the said executrix by her attorney and counsel, the said Talbot.

And your orator shows that after the execution and publication and formal delivery to him of the award on the twentieth day of December last, in the absence of the attorney of the said executrix, he returned the said award to the arbitrator temporarily in order that the said Mary H. Pike, executrix, might have the privilege of examining the said award and of suggesting to the arbitrator any matters or things which might have been overlooked or omitted.

And your orator is informed and believes and therefore avers that the said executrix afterward, viz., on or about the twenty-second day of December last, did examine said award in the presence of the arbitrator by or through Thomas H. Talbot, Esq., her counsel and attorney in this particular matter, and E. B. Harvey, of Calais, Me., her legal adviser and attorney in all matters relating to the estate of her deceased husband of which she had become the assignee and owner as residuary legatee under the will.

And your orator shows that on the twenty-fourth day of December last, he was informed by the said Mary H. Pike, through her attorney and counsellor, the said E. B. Harvey, that she had through him and by a letter addressed to the arbitrator undertaken to revoke the power of said arbitrator under said submission, and to thereby annul or vacate the award made by him as aforesaid; and immediately upon receiving such information he waited upon the said arbitrator through F. A. Brooks, his attorney, in company with Thomas H. Talbot, the attorney of the said Mary H. Pike, and the said Brooks received back from said arbitrator the award made by him as aforesaid, on the twentieth day of December, and the said Brooks and Talbot together received of said arbitrator the said two Swift

notes and carried the same to John G. Stetson, Esq., to whom they intrusted the same, taking therefor his receipt in their joint names, a copy of which, marked "Exhibit 3", is hereto annexed.

And your orator shows that subsequently to, viz., on the fourth of January current, in order to entitle himself to the sole and exclusive possession of said Swift notes under the said award, he paid the note of $2,437.50 running to C. H. Eaton, of Calais, in said award mentioned, to the said Thomas H. Talbot, and took and received from said Talbot the said Eaton note and now holds the same, by reason of which and of the award of the said arbitrator your orator became entitled to receive from the said Stetson the said Swift notes, and the said Mary H. Pike, executrix and residuary legatee under the will of the said F. A. Pike, deceased, and the said Talbot as her agent or attorney, ceased to have any right to or in said Swift notes, or either of them, or any right to demand or receive the possession thereof from the said Stetson, under the terms of the receipt of said Stetson therefor given on the twenty-fourth day of December last.

And your orator shows that the said Charles F. Jones, the payee of said two notes, transferred and assigned to him the said two notes by an instrument in writing under his hand and seal dated the fifth day of December, 1884, and by said instrument authorized your orator to sue for and collect the said notes, using the name of said Jones for the purpose, and generally to deal with the same as his own property in every respect and to release and discharge the same.

[And your orator shows that while the two said Swift notes were in the possession of the said F. A. Pike, viz., on or about the eighth day of January last, it was agreed and arranged between your orator and the said Pike that the larger of said two notes, viz., that of $20,-334.60, should be put in suit in the name of Charles F. Jones on the law side of this court under the joint supervision, direction and control of the said Talbot as the attorney of said Pike, and of F. A. Brooks as the attorney of your orator; that such a suit was brought in the name of said Jones, but for the use and benefit of whichever of them should appear to be entitled thereto, and prosecuted by said attorney jointly, and a judgment was obtained thereon on the law side of this court for the amount of said note against the said Swift on the sixteenth day of December last, that is to say, just four days previously to the time of this award of the arbitration in favor of your orator as the party entitled to the possession of the said notes; that on the sixth day of January current and after your orator had by the payment of said Eaton note to the said Talbot extinguished thereby whatever right the said Mary H. Pike as executrix of the will of her deceased husband might previously have had in or to said Swift notes or to the possession thereof, the defendant, Swift, paid into the registry of this court in the said suit at law of Jones against him the

sum of $24,926.90, being the amount supposed to be payable under the judgment recovered against him in the name of said Jones as aforesaid, with interest thereon till said sixth day of January.

And your orator shows that by reason of the submission to arbitration as aforesaid, and of the proceedings had under said submission and the award of the said arbitrator, he has become entitled to represent the said note as the sole owner thereof and of the judgment obtained thereon against the said Swift, and that the said Mary H. Pike has ceased since the fifth day of January current to be the owner of said note of $20,334.60, or any interest therein, and of any right to represent the plaintiff, Jones, in said suit at law for the recovery of the amount of said note, or of the judgment rendered therein as aforesaid, and that said Mary H. Pike, executrix, has now no right to receive the money paid into court by said Swift, as aforesaid, in said suit at law, or to release and discharge the judgment rendered in favor of the plaintiff in said suit, or to assume to do so.

And your orator shows that by the decease of the said Pike at Calais on or about the second day of December last, the said Talbot ceased to have any lawful power to act as the attorney of said Pike in the said suit at law, and that since that time the will of said Pike has not been probated or allowed, nor any letters testamentary issued thereon to said Mary H. Pike, and no administration has been taken upon the estate of said Pike in this district of Massachusetts.

And your orator prays that it may be so decreed by your Honors, and that it may be further adjudged and decreed that your orator has become entitled both as the owner of said note of $20,334.60, or as the assignee thereof from the said Jones, to represent the said Jones as plaintiff in said suit at law, and to receive the money paid into court in said suit at law by the defendant, Swift, as aforesaid, and to release and discharge said judgment, and acknowledge satisfaction thereof; and that your orator may be permitted to do so by order of this honorable court; and that the said Stetson may be directed or permitted to surrender and deliver up to your orator the said note of $20,334.60, now in his hands, that the same may be filed in court in the said suit at law, or surrendered up to the defendant, Swift, or cancelled.

And that the defendant Talbot may be ordered and required to release and discharge the said Stetson from any claim or demand against him by reason of the receipt of said Stetson, promising to hold said note of $20,334.60 subject to the order or direction of the said Talbot and Brooks, or either of them; and that the said Swift may be ordered and directed by this honorable court to recognize the right of your orator to collect and receive the amount of said judgment by appropriating the money paid into court by him as aforesaid in said suit at law, and not to take or accept any release or discharge of said note or of said judgment from or under the said Talbot.

And your orator prays for such other and further relief as he may be entitled to in the premises.

To this end may it please your Honors to grant a writ of subpœna to be issued in due form of law, directed to the said Swift, Stetson and Talbot, commanding them and each of them to appear in court, and full, true, direct and perfect answer make to this bill of complaint, and to abide the orders and decrees of the court which may be made herein.]

CHARLES A. GREGORY.

F. A. BROOKS,

Solicitor for GREGORY, *Complainant.*

N. B. The last three pages of the above exhibit (being the portion enclosed in brackets), relating wholly to the Swift note of $20,334.60, and not to the $15,000 note, are not applicable in or material to the consideration of the plaintiff's bill of complaint in this case.

F. A. BROOKS, *Plaintiff's Solicitor.*

EXHIBIT 1.

WHEREAS, Frederic A. Pike, of Calais, Me., is in possession of two certain instruments or promissory notes made or signed by W. C. N. Swift, of New Bedford, Mass., dated April 20, 1883, and payable to Charles F. Jones, one for the sum of $15,000, payable in two years from its date, the other for the sum of $20,334.60, payable in three years from its date, and Charles A. Gregory of Chicago claims to be the real owner of said notes, and has brought a suit or bill in equity against the said Pike to obtain the possession of the said notes or instruments, which said suit is now pending before the Circuit Court of the United States for the District of Massachusetts, and the said suit has been set down for hearing in said court, and a record thereof made up and printed for such hearing, and the parties to said cause have agreed to submit the same to the determination of Ebenezer R. Hoar, of Concord, Mass., as arbitrator or referee, with the same power of passing upon and determining all questions raised and presented in said suit as if he were presiding as a judge in said court on the hearing of said cause, upon the evidence contained in the said record, the said referee to be governed by the rules of law applicable to said cause, as he would be if sitting as a judge in said court.

Now, therefore, know all men by these presents, that the said Pike and Gregory do hereby submit the questions raised or presented by said suit in equity, and all of them, to the determination of the said E. R. Hoar, the award or decision of whom in the premises

shall be final. And if either of said parties shall neglect to appear before said referee, after due and reasonable notice of the time and place appointed for the hearing of said matter, the referee may proceed in his absence. And it is further agreed that the said two notes, the rightful possession of which is in controversy, shall be forthwith delivered to said referee by said Pike, and be left in his possession to wait and abide the award of said referee to be made in the premises; and that said notes shall be by said referee passed over to whichever of said two parties shall, in his judgment, be entitled thereto. And it is further agreed that the charges of said referee for his services in this matter shall be paid equally by each party, that is, divided between them.

And the said Pike and Gregory agree that they will respectively observe, keep and perform the award of the said referee of and concerning the premises in all respects.

It is further agreed, that this submission is based upon a good and valuable consideration as between the parties thereto, and that the same shall be binding upon their assigns and legal representatives, respectively, in the case of the death of either of said parties before the making and publication of any award under this submission.

It is further agreed, that if the said E. R. Hoar, herein selected as referee, shall be unable or unwilling to act as such referee, he shall have the power of appointing some one to act in his place; and that the person so named by him to act as referee shall have all the powers hereby or herein conferred upon him, the said Hoar.

Dated this, the thirtieth day of November, A. D. 1886.

FREDERICK A. PIKE,
By THOMAS H. TALBOT.

CHARLES A. GREGORY,
By F. A. BROOKS.

EXHIBIT 2.

AWARD.

The undersigned, referee in the matter submitted to him by Charles A. Gregory and Frederic A. Pike, under the submission a copy of which is hereto annexed, having duly heard the parties, awards and determines thereon, and this is my final award in the premises as follows, to wit: —

That the said Pike is not entitled to detain or withhold from said Gregory the two Swift notes mentioned or described in the submission, except for the purpose of securing the payment of another certain note, signed by G. W. Butterfield and Charles F. Jones, for the sum of $2,437.50, dated July 26, 1883, and payable to C. H. Eaton, of Calais, Me., or order, a copy of which is hereto annexed;

that upon or after the said Eaton note, or whatever sum is now due thereon with interest, as stipulated in said note, shall have been paid by the said Gregory, the said Gregory will be entitled to the possession of the two Swift notes, one of $15,000, and one of $20,334.60.

He also finds and determines that upon the payment of said Eaton note by said Gregory, he will be entitled to a transfer or delivery to himself of said Eaton note, and to the benefit of any sums which may be recovered of the said Butterfield and Jones on said note.

Dated at Boston the thirtieth day of November, in the year one thousand eight hundred and eighty-six.

E. R. HOAR.

BANGOR, ME., July 26, 1883.

On or before Jan. 1, 1884, we promise to pay to C. H. Eaton, or order, two thousand four hundred and thirty-seven dollars and fifty cents, with interest at the rate of one per cent. per month from date. Value received.

G. W. BUTTERFIELD.
CHARLES F. JONES.

EXHIBIT 3.

3.7.8 BOSTON, Dec. 24, 1886.

Received of Thomas H. Talbot, Esq., as attorney for Mary H. Pike, executrix of Frederick A. Pike, and of Francis A. Brooks, Esq., as attorney of Charles A. Gregory, two notes of hand made or signed by W. C. N. Swift, of New Bedford, dated April 20, 1883, one for $15,000, on two years' time, and one for $20,334.60, three years' time, payable to Charles F. Jones. Said notes are to be held by me, subject to the joint order and direction of the said Talbot and Brooks, and dealt with as they may jointly direct.

JOHN G. STETSON.

EXHIBIT 4.

CIRCUIT COURT OF THE UNITED STATES,

DISTRICT OF MASSACHUSETTS.

IN EQUITY.

No. 2170.

CHARLES A. GREGORY *v.* FREDERIC A. PIKE ET AL.

PETITION OF WILLIAM C. N. SWIFT.

[FILED JUNE 13, 1887.]

To the Honorable the Judges of the Circuit Court of the United States within and for the District of Massachusetts:

The humble petition of William C. N. Swift, one of the defendants in the above-entitled cause, showeth: —

That heretofore on the law side of this honorable court at the October term thereof, 1885, to wit, on the twenty-eighth day of January, 1886, he was defaulted in an action wherein Charles F. Jones was the plaintiff of record, on a certain promissory note for the sum of $15,000, being the note for that sum mentioned in the pleadings and evidence in this cause.

That the said action now stands continued for judgment.

That your petitioner has always been and now is ready and willing and hereby offers to pay the amount of the judgment to be entered in said action to the person or persons lawfully entitled to receive the same, but that by the proceedings in this cause he has notice that the same is claimed by several different persons, some of whom are parties to this cause, and by reason of such notice and the pendency of this cause, he cannot safely pay said sum to any one of such persons.

That your petitioner has been notified by Thomas H. Talbot, Esquire, being or claiming to be the attorney for said Jones, the nominal plaintiff in said action at law, and likewise for the legal representatives of Frederic A. Pike, late a defendant in this suit, now deceased, who in his life was or pretended to be beneficially interested as plaintiff in said action at law, that he, the said Talbot, intends to move this honorable court on the law side thereof for judgment against your petitioner in said action at law.

That if said Talbot be permitted to collect or receive from your petitioner the amount of the judgment entered or to be entered in said action, your petitioner will remain liable to the demands of all

other parties claiming title to the proceeds of said judgment or of the note whereon it is recovered, which said claims are now in litigation in this present suit as by inspection of the record thereof to this honorable court more fully will appear.

Wherefore your petitioner prays that the said Talbot and the said Jones and the representatives of said Pike may be restrained and enjoined from suing out or levying execution upon any judgment so to be entered as aforesaid, until the final determination of this present suit; and that in the mean time your petitioner may have leave to pay into court in said action at law the amount of the judgment in the same; that upon such payment this honorable court will order satisfaction of such judgment to be entered of record, and the note whereon said action at law is brought to be produced by said Talbot and cancelled; and that thereupon the sum so paid into court by your petitioner in said action may be transferred to the credit of this present cause, there to remain until the final hearing thereof, and to be disposed of as this honorable court by its decree to be made in this cause shall hereafter order and adjudge, and that your petitioner may have such other and further relief as the nature of this case may require and to your Honors shall seem meet.

And your petitioner as in duty bound will ever humbly pray.

WILLIAM C. N. SWIFT,
By his solicitor, HENRY W. SWIFT.

EXHIBIT 5.

UNITED STATES CIRCUIT COURT,

DISTRICT OF MASSACHUSETTS.

No. 2435, Law Docket.

CHARLES F. JONES *v.* WILLIAM C. N. SWIFT.

PETITION OF CHARLES A. GREGORY.

The petition of Charles A. Gregory, of the city of Chicago and State of Illinois, respectfully shows that the above-entitled suit was brought to recover the amount of a certain note of fifteen thousand dollars made by the defendant, Swift, payable to the plaintiff, Jones, but not belonging to the said Jones or in the possession of said Jones at the time of the commencement of said suit; that said Swift note at and before the commencement of said suit belonged either to Frederic A. Pike, of Calais, Me., or your petitioner, Charles A. Gregory, being claimed by each of them as his property;

that in consequence of these opposing claims of ownership of said note it was, on the twenty-sixth day of March, 1885, agreed between said Pike and your petitioner, between whom a suit in equity was then pending to determine their respective claims to the ownership of said note, that said note, if not paid at maturity, should be put in suit by Thomas H. Talbot, an attorney at law, selected or agreed on for that purpose by said Pike and Gregory, and collected as soon as might be, and the proceeds thereof, when collected, paid over to whichever of the two claimants, Pike or Gregory, should be held entitled to the same in the suit in equity aforesaid; that afterwards and before any decision made in said suit in equity as to the ownership of said note, it was agreed between the said Pike and Gregory that the question of the title or ownership of said note as between them should be referred to the Hon. E. R. Hoar for decision, and that said question was so referred, and was heard and determined by said arbitrator and an award made in writing by him in favor of the title of your petitioner as the owner of said note.

That the said Pike deceased on or about the first day of December, 1886, and that the suit in equity hereinabove mentioned became thereby abated, so that no decision ever has been or can now be made concerning the title of said note as contemplated by the said Pike and Gregory in their agreement of March 26, 1885, above mentioned.

And your petitioner further shows that the above-entitled suit at law was brought by the said Talbot in pursuance of said agreement of March 26, 1885, for the benefit of whichever of the two claimants aforesaid should prove to be the rightful owner of said note, and that the defendant, Swift, was defaulted in said suit, so that a judgment can now be had against said Swift in favor of the nominal plaintiff, Jones, and that the said Talbot is now seeking to obtain such judgment, notwithstanding the decease of said Pike, and is seeking to collect said note through such judgment, in the interest of said Pike or his legal representatives, under and by virtue of his employment as attorney for said purpose by the mutual consent and agreement of said Pike and Gregory, made in writing on the twenty-sixth day of March as aforesaid.

And your petitioner shows that by reason of the award or decision of the said arbitrator as to the ownership of said note in favor of your petitioner, and of the death of said Pike, said Talbot is no longer entitled or authorized to represent Jones, the nominal plaintiff in said suit at law, or to represent the interest of your petitioner in said suit at law.

Wherefore, your petitioner prays that he may be permitted to appear and be heard before this honorable court for the protection of his rights and claims of property in said note, in any further proceedings to be had in the above-entitled suit.

By his attorney,

F. A. BROOKS.

DEMURRER OF DEFENDANT, STETSON, TO AMENDED BILL.

(Filed Jan. 31, 1889.]

Demurrer of John G. Stetson, *one of the Defendants herein, to the Bill of Complaint, as amended, of* Charles A. Gregory, *Complainant herein.*

This defendant, by protestation, not confessing any or all of the matters and things in the complainant's bill of complaint, as amended, alleged to be true in such manner and form as the same are set forth and alleged, doth demur to the said bill and for causes of demurrer showeth: —

1. That it appears in and by said bill that there is another cause pending in this court, commenced by a bill of complaint, filed by this complainant Jan. 10, 1887, wherein the said Gregory, complainant herein, is complainant, and the defendants herein, said Swift and Stetson, and one Thomas H. Talbot, are defendants, in which cause the matters and things alleged by complainant herein were duly put in issue; wherefore the said Stetson should not be required again to plead as to said matters and things.

2. That this bill as amended not being supplemental to the said bill of Jan. 10, 1887, the said complainant, by annexing to the bill herein said bill of Jan. 10, 1887, and making a portion thereof a part of this bill, and at the same time omitting the answers and issues therein, has so garbled the record upon said bill of Jan. 10, 1887, that this defendant should not be required to make answer to this bill, based as it is upon said bill of Jan. 10, 1887.

3. That, from the bill herein, said bill of Jan. 10, 1887, appears to be a bill in the nature of a supplemental bill to a bill of complaint brought Dec. 16, 1884, against the said Swift, defendant herein, and one Frederic A. Pike, and to be a part of a litigation pending in this court, relating among other things to the ownership of the $15,000 Swift note, referred to in the bill herein, and the proceeds thereof, which litigation appears to be entitled in this court No. 2170, Charles A. Gregory *v.* Frederic A. Pike *et al.*, the parties thereto being, so far as this bill of complaint shows, Charles A. Gregory, the complainant herein, William C. N. Swift and John C. Stetson, defendants herein, Mary H. Pike, executrix of Frederic A. Pike, and one

Thomas H. Talbot; wherefore, it appearing that all the parties hereto are parties to said cause No. 2170, and that the ownership of said $15,000 Swift note and the proceeds thereof are matters of controversy therein, this defendant should not be required to make answer to this bill.

4. That the bill herein is in substance a petition for a rehearing of the petition of Mary H. Pike, executrix, filed June 21, 1887, in said equity cause No. 2170, upon which petition the order of court was entered July 9, 1887, as stated in the bill herein, copies of said petition and order of court for convenience of reference being hereto annexed, marked "Copy Petition of Mary H. Pike, Executrix", and "Copy Order of Court of July 9, 1887"; that a rehearing of said petition of Mary H. Pike, executrix, and a reversal or modification of said order of court cannot properly be had in and by any proceedings herein, but, if such rehearing and reversal are to be had in this court, they must be had upon due notice to all the parties interested therein and by proper action in said original cause No. 2170, wherein said petition was heard and said order was entered.

5. That complainant's bill is not to be maintained as a bill of review or in the nature of a bill of review, for that it is not brought to revise any final decree of this court and does not point out any error in law in the decree or order complained of, nor allege any newly discovered facts or evidence.

6. That this bill does not set out any cause of complaint against this defendant cognizable at or maintainable in equity.

7. That this bill neither shows any cause for relief nor asks for any relief for any existing cause as against this defendant, but seeks that a burden may be imposed upon this defendant without his consent, and then that the court shall decree a relief against this defendant therefor.

8. That this bill seeks equitable relief against this defendant for acts done by this defendant as an officer of this court under the orders and decrees of this court and for which this court and not this defendant personally is responsible.

9. That this bill is defective for want of parties, in that it does not make Mary H. Pike, executrix of Frederick A. Pike, Thomas H. Talbot and Francis A. Brooks, or either of them, parties thereto.

10. That this bill is contradictory and inconsistent in its statement of material allegations.

Wherefore, and for other good causes of demurrer appearing in said bill, this defendant doth demur thereto and humbly demands the judgment of this court whether he shall be compelled to make any further or other answer to said bill, and prays to be hence dismissed with his costs and damages in this behalf most wrongfully sustained. JOHN G. STETSON.

I certify that in my opinion this demurrer is well founded in law.

JOHN G. STETSON *pro se.*

I, as defendant herein, declare that this demurrer is not interposed for delay. JOHN G. STETSON.

UNITED STATES OF AMERICA,

DISTRICT OF MASSACHUSETTS, ss.

On this thirty-first day of January, A. D. 1889, personally appeared the above-named John G. Stetson, and made oath that the above declaration by him subscribed is true.

Before me,

[SEAL] ALEX. H. TROWBRIDGE,

Deputy Clerk.

COPY PETITION OF MARY H. PIKE, EXECUTRIX.

CIRCUIT COURT OF THE UNITED STATES,

DISTRICT OF MASSACHUSETTS.

No. 2170, Equity.

CHARLES A. GREGORY *v.* FREDERICK A. PIKE ET AL.

PETITION OF MARY H. PIKE, EXECUTRIX.

[FILED JUNE 21, 1887.]

The petition of Mary H. Pike, executrix of the above-named Frederic A. Pike, she having been summoned in by said Gregory and having appeared and filed her answer, as such executrix, respectfully represents: —

That John G. Stetson, a defendant in this case, holds a certain promissory note signed by the defendant, W. C. N. Swift, for fifteen thousand dollars, dated April 20, 1883.

That said note is one of the two notes as to which the said suit is brought to establish the title thereto; that judgment is about to be entered in a case at law pending in the court No. 2435, Jones *v.* Swift, brought to recover the amount of said note, and said Swift is about to pay said amount into court.

Now your petitioner says that said Stetson was intrusted with said notes by F. A. Brooks, as attorney for said plaintiff, Gregory, and Thomas H. Talbot, as attorney for your petitioner.

That said Stetson having been made a party to this bill for the very purpose of requiring him to deal with said note as your Honors may order; and this court has full power over said Stetson in the premises.

She thereupon prays that said Stetson be ordered to file said note in said action at law, in order that judgment may be properly entered in said action.

And further, that if said Swift shall pay the amount of the said judgment into the registry of this court, that the same may be held subject to the rights of all parties claiming said note, and to abide the decision of this court in this cause.

MARY H. PIKE,
By J. LOWELL, *Attorney.*

COPY ORDER OF COURT, JULY 9, 1887.

CIRCUIT COURT OF THE UNITED STATES,

DISTRICT OF MASSACHUSETTS.

No. 2170 Equity.

CHARLES A. GREGORY *v.* FREDERIC A. PIKE ET AL.

ORDER OF COURT.

[JULY 9, 1887.]

NELSON, J. Upon the petition of Mary H. Pike, executrix, filed in this cause, and with the consent of Swift and Butterfield, defendants in this cause, and of Thomas H. Talbot, attorney for Charles F. Jones in the suit at law of Jones *v.* Swift, No 2435 on the law docket of this court, It is ordered: —

(1) That defendant, Stetson, file the note of $15,000, referred to in the said petition, in the said action at law No. 2435, of Jones *v.* Swift.

(2) That, upon the entry of judgment in the said action at law, said Swift be directed to pay into the registry of this court the amount of said judgment (but without commissions, by consent of

the parties named herein) and that said amount be held subject to the rights of the parties claiming said note, and to abide the decision of the court in this cause.

(3) That upon the payment by said Swift into the registry of this court of the amount of said judgment an order of satisfaction of said judgment be entered of record.

By the Court:

ALEX. H. TROWBRIDGE,
Deputy Clerk.

DEMURRER OF DEFENDANT, SWIFT, TO AMENDED BILL

[FILED FEB. 5, 1889.]

The Demurrer of WILLIAM C. N. SWIFT, *Defendant, to the amended Bill of Complaint of* CHARLES A. GREGORY, *Plaintiff.*

This defendant, by protestation, not confessing all or any of the matters and things in the plaintiff's bill of complaint to be true in such manner and form as the same are therein set forth and alleged, doth demur to said bill, and for causes of demurrer showeth: —

1. That said bill is, in substance, a petition for the rehearing of a decree already made by this honorable court, and is not verified by the oath of the party, or any other person, nor filed before the end of the term next following that in which said decree was entered and recorded, as required by the 88th rule of this court.

2. That a rehearing of said decree may be obtained, if at all, only by petition in the cause wherein said decree was made, and not by this proceeding.

3. That said bill is not brought to reverse any final decree of this court, and does not point out any error in law in the decree complained of, nor allege any newly discovered facts or evidence, and does not purport to be filed by leave of court, and therefore is not sustainable as a bill of review, or in the nature of a bill of review.

4. That said bill professes to incorporate, by reference, some part of a former bill in this court, a copy whereof is annexed by the plaintiff to this bill, but does not show otherwise than by general reference what part of said former bill is or is conceived by the plaintiff to be material in this suit.

5. That by said former bill referred to and incorporated as aforesaid, it appears that one Thomas H. Talbot was a party thereto, and that the same was supplemental to a previous bill in this court, whereunto one Frederic A. Pike was a party; and it further appears that said Pike is deceased testate, and that one Mary H. Pike is his executrix, yet neither said Talbot nor said Mary H. Pike are made parties to this suit.

6. That the plaintiff does not show what proceedings have been had on his former bill referred to and incorporated as aforesaid nor on the bill whereunto the same is supplemental, by reason whereof the record is imperfect and defective and insufficient for the determination of the rights of the parties.

7. That it appears by said bill that this defendant has not nor claims to have any interest in the subject matter thereof.

8. That it appears by said bill that the obligation of this defendant therein mentioned is fully paid and satisfied.

9. That it appears by said bill that the money claimed by the plaintiff is now in the custody of this court in the cause of Gregory against Pike and others pursuant to the order and decree of this honorable court passed and pronounced after hearing the plaintiff and others interested in the premises, and the plaintiff has a full, complete and adequate remedy to recover the same by prosecuting that suit.

10. That said bill does not contain any matter of equity whereon this court can ground any decree or give to the plaintiff any relief against this defendant.

Wherefore, and for divers other good causes of demurrer appearing in said bill, this defendant doth demur thereto, and humbly prays the judgment of this court whether he shall be compelled to make any further or other answer to said bill, and prays to be hence dismissed with his costs and charges in this behalf most wrongfully sustained.

WILLIAM C. N. SWIFT,
By his Solicitors, GRAY & SWIFT.

I certify that in my opinion this demurrer is well founded in point of law.

RUSSELL GRAY,
of Counsel.

On behalf of the above-named defendant, I depose and say that this demurrer is not intended for delay.

RUSSELL GRAY.

COMMONWEALTH OF MASSACHUSETTS.

SUFFOLK, ss. FEB. 5, 1889.

Subscribed and sworn to before me.

T. FRANK NOONAN,
Notary Public.

[SEAL]

RECORD OF THE CASE.

UNITED STATES OF AMERICA.

MASSACHUSETTS DISTRICT, ss.

At a Circuit Court of the United States for the First Circuit, begun and holden at Boston, within and for the District of Massachusetts, on Wednesday, the fifteenth day of May, in the year of our Lord one thousand eight hundred and eighty-nine.

Before

THE HONORABLE THOMAS L. NELSON,
District Judge.

No. 2557, Equity.

CHARLES A. GREGORY *v.* WILLIAM C. N. SWIFT ET AL.

The original bill of complaint in this cause, being a bill of complaint in the nature of a supplemental bill against the defendants herein, was filed in the clerk's office on the fifteenth day of October, 1888; the defendant Swift filed a demurrer to this bill on the twenty-eighth day of November, 1888, and the complainant set the said demurrer down for argument on the fifth day of January, 1889; the defendant Stetson filed a demurrer to this bill on the fifth day of January, 1889, and the complainant set the said demurrer down for argument on the seventh day of January, 1889; on the twenty-eighth day of January, 1889, the complainant obtained leave of Court to amend his said original bill, and on the thirtieth day of January, 1889, the complainant filed the amended bill of complaint herein (see page 1); the defendant Stetson filed a demurrer to said amended bill of complaint (see page 15) on the twenty-first day of January, 1889, and the complainant set the same down for argument on the fourth day of February, 1889; the defendant Swift filed a demurrer to said amended bill of complaint (see page 19) on the fifth day of February, 1889, and the complainant set the same down for argument on the seventh day of February, 1889.

This cause came on to be heard on the said demurrers before the Honorable Le Baron B. Colt, circuit judge, sitting, on the twenty-second day of March, 1889, and was partially heard, and the hearing was continued to the thirtieth day of March, 1889. On the twenty-sixth day of March, 1889, the complainant filed a motion to amend his bill of complaint, which motion was allowed by the Court, the Honorable Le Baron B. Colt, circuit judge, sitting, on the thirtieth day of March, 1889, and by agreement of counsel the demurrers to the amended bill heretofore filed were ordered to stand as the demurrers to the bill as further amended with "multifariousness" to be considered as an additional alleged ground of demurrer. The hearing on the said demurrers was thereupon resumed before the said Honorable Le Baron B. Colt, circuit judge, sitting, and the demurrers were fully argued by counsel for the complainant, counsel for the defendant Swift, and by the defendant Stetson, *pro se*. This cause was thence continued to this present May term, 1889, when, on the twentieth day of September, 1889, the opinion of the Court sustaining the said demurrers is announced. On the twenty-sixth day of September, 1889, the complainant comes and files the following agreement: —

AGREEMENT.

[FILED SEPT. 26, 1889.]

It is agreed in the above-entitled cause that the bill of complaint may be dismissed as against William C. N. Swift, one of the defendants

GRAY & SWIFT, *for Defendant* SWIFT.

Thereupon the following final decree is entered: —

FINAL DECREE.

[SEPT. 26, 1889.]

This cause came on to be heard at the October term of this Court, A. D. 1888, upon the demurrers of the defendants to the amended bill of complaint herein, and was fully argued, and thence this cause was

continued to this present term, and now, to wit Sept. 26, 1889, upon consideration thereof, It is ordered that the bill of complaint herein as amended be dismissed as against the defendant Swift, in accordance with the agreement this day filed; and it is further ordered, adjudged and decreed that the demurrer of the defendant Stetson be sustained, and that thereupon the bill of complaint herein as amended be dismissed as against the said defendant Stetson, with costs taxed at twenty-three dollars and thirty cents ($23.30).

By the Court,

JOHN G. STETSON, *Clerk.*

From this decree the complainant in open court claims an appeal to the Supreme Court of the United States as follows:—

COMPLAINANT'S CLAIM OF APPEAL.

[FILED SEPT. 26, 1889.]

And now, after the dismissal of the bill of complaint as against the defendant Swift and judgment entered in favor of the defendant Stetson in the above-entitled cause, the plaintiff comes and in open court claims an appeal from the judgment entered in favor of Stetson.

By his Solicitor,

F. A. BROOKS.

The complainant thereupon gives good and sufficient security to the said defendant Stetson that he will prosecute his appeal to effect and answer all damages and costs if he fail to make his plea good, and said appeal is allowed by the Court.

A true record:

Attest: JOHN G. STETSON, *Clerk.*

COPY BOND TO PARTY ON APPEAL.

Know all men by these presents, that we, Charles A. Gregory, of Chicago, Illinois, as principal, and Francis A. Brooks, of Boston, Massachusetts, as surety, are held and firmly bound unto John G. Stetson, of Boston, Massachusetts, in the full and just sum of three hundred dollars to be paid to the said obligee, his certain Attorney, Executor, Administrators, or Assigns; to which payment well and truly to be made we bind ourselves, our Heirs, Executors, and Administrators, jointly and severally, by these Presents.

Sealed with our seals, and dated the ninth day of October, in the year of our Lord one thousand eight hundred and eighty-nine.

Whereas lately at a Circuit Court of the United States for the District of Massachusetts, in a suit in equity, depending in said court between said Charles A. Gregory, complainant, and one William C. N. Swift and said John G. Stetson, defendants, a decree was rendered against the said Gregory and in favor of the said Stetson; and the said Gregory having obtained an appeal to remove the said cause to the Supreme Court of the United States to reverse the decree in the aforesaid suit, and a citation directed to the said Stetson admonishing him to be and appear at a Supreme Court of the United States to be holden at Washington on the second Monday of October current:

Now the condition of the above obligation is such, that if the said Charles A. Gregory shall prosecute his said Appeal to effect, and answer all damages and costs, if he fail to make his plea good, then the above obligation to be null and void; otherwise to remain in full force and virtue.

CHARLES A. GREGORY,
By F. A. BROOKS, *his attorney in fact.* [L. S.]
FRANCIS A. BROOKS. [L. S.]

Approved:
LE BARON B. COLT,
Circuit Judge.

UNITED STATES OF AMERICA.

MASSACHUSETTS DISTRICT, ss.

I, John G. Stetson, Clerk of the Circuit Court of the United States, for the First Circuit and District of Massachusetts, certify that the foregoing is a true copy of the record of the Circuit Court in the cause in equity entitled.

No. 2557.

CHARLES A. GREGORY, COMPLAINANT,

v.

WILLIAM C. N. SWIFT ET AL., DEFENDANTS,

in said Circuit Court determined, and that annexed hereto is a true copy of the opinion of the court in said cause, in accordance with which the final decree therein was entered.

In testimony whereof I hereunto set my hand and affix the seal of said Circuit Court, at Boston, in said district, this ninth day of October, in the year of our Lord one thousand eight hundred and eighty-nine, and of the Independence of the United States the one hundred and fourteenth.

[SEAL] JOHN G. STETSON, *Clerk.*

Circuit Court of the United States,

DISTRICT OF MASSACHUSETTS.

IN EQUITY.

No. 2557.

CHARLES A. GREGORY *v.* WILLIAM C. N. SWIFT ET AL.

OPINION OF THE COURT.

[FILED SEPTEMBER 20, 1889.]

COLT, J. The bill in this case is directed mainly against defendant Stetson (the counsel for plaintiff admitting that defendant Swift was not made a party for the purpose of charging him with any liability to the plaintiff) and it charges Stetson with having violated the following contract of bailment, with respect to the $15,000 note mentioned therein:

"BOSTON, DEC. 24, 1886.

Received of Thomas H. Talbot, Esq., as attorney for Mary H. Pike, executrix of Frederic A. Pike, and of Francis A. Brooks, Esq., as attorney of Charles A. Gregory, two notes of hand made or signed by W. C. N. Swift, of New Bedford, dated April 20, 1883, one for $15,000, on two years' time, and one for $20,334.60, three years' time, payable to Charles F. Jones. Said notes are to be held by me, subject to the joint order and direction of the said Talbot and Brooks, and dealt with as they may jointly direct.

JOHN G. STETSON."

The bill alleges that defendant Stetson, under certain orders of court which were irregular and contrary to law, parted with the possession of said note and filed it in an action at law of *Jones* v. *Swift*, pending in this court; that thereupon judgment was entered in said action at law and the amount of said note or judgment was paid by said Swift to the clerk of the court, Stetson, who now claims to hold the same subject to the rights of the parties in the old equity cause, No. 2,170, of this complainant against Frederic A. Pike and others, originally pending in this court, but which the bill alleges became abated before the passage of the order referred to by reason of the death of said Frederic A. Pike. The bill also alleges that, on or before July 9, 1887, the complainant became the lawful owner of said $15,000 note.

In the present bill there is incorporated a part of a certain bill brought in this court by this complainant against these defendants and Thomas H. Talbot, January 10, 1887. In that bill it is alleged that the matters in controversy between this complainant and Frederic A. Pike, respecting the ownership of these notes were submitted to the Hon. E. R. Hoar as arbitrator, that pending the submission, the said Pike died, having appointed his wife, Mary H. Pike, of Calais, Maine, executrix of his will and residuary legatee of all his estate; that Mrs. Pike appeared before the arbitrator at the hearings by her counsel Talbot; that the arbitrator, on November 30, 1886, delivered an award in writing which was favorable to the complainant. The bill further alleges as follows:

"That on the twenty-fourth day of December last, he (the complainant) was informed by the said Mary H. Pike, through her attorney and counsellor, the said E. B. Harvey, that she had through him and by a letter addressed to the arbitrator undertaken to revoke the power of said arbitrator under said submission, and to thereby annul or vacate the award made by him as aforesaid; and immediately upon receiving such

information he waited upon the said arbitrator through F. A. Brooks, his attorney, in company with Thomas H. Talbot, the attorney of the said Mary H. Pike, and the said Brooks received back from said arbitrator the award made by him as aforesaid, on the twentieth day of December, and the said Brooks and Talbot together received of said arbitrator the said two Swift notes and carried the same to John G. Stetson, Esq., to whom they intrusted the same, taking therefor his receipt in their joint names.

That on the fourth of January current, in order to entitle himself to the sole and exclusive possession of said Swift notes under the said award he paid the note of $2,437.50 running to C. H. Eaton, of Calais, in said award mentioned, to the said Thomas H. Talbot, and took and received from said Talbot the said Eaton note and now holds the same, by reason of which and of the award of the said arbitrator your orator became entitled to receive from the said Stetson the said Swift notes, and the said Mary H. Pike, executrix and residuary legatee under the will of the said F. A. Pike, deceased, and the said Talbot as her agent or attorney, ceased to have any right to or in said Swift notes, or either of them, or any right to demand or receive the possession thereof from the said Stetson, under the terms of the receipt of said Stetson therefor given on the twenty-fourth day of December last."

The prayer of the bill as amended is as follows:

"And your orator prays that the money so paid by the defendant, Swift, into the hands of the defendant, Stetson, as clerk of this court, in satisfaction of the said $15,000 note, may be remanded to the custody of said Stetson in his individual capacity, as if no such orders, as above recited, had been passed, and in the place and stead of the said $15,000 note, so surrendered by him, and filed with the papers in equity suit No. 2,170, in violation of the terms and provisions of the contract entered into by him with your orator as aforesaid, on the twenty-fourth day of December, 1886; and that the said Stetson may be ordered and decreed to pay over the proceeds of said note to your orator; and your orator prays for such other and further relief as he may be entitled to in the premises."

The bill alleges that defendant Stetson, under certain orders of court which were irregular and contrary to law, parted with the possession of said note and filed it in an action at law of *Jones* v. *Swift*, pending in this court; that thereupon judgment was entered in said action at law and the amount of said note or judgment was paid by said Swift to the clerk of the court, Stetson, who now claims to hold the same subject to the rights of the parties in the old equity cause, No. 2,170, of this complainant against Frederic A. Pike and others, originally pending in this court, but which the bill alleges became abated before the passage of the order referred to by reason of the death of said Frederic A. Pike. The bill also alleges that, on or before July 9, 1887, the complainant became the lawful owner of said $15,000 note.

In the present bill there is incorporated a part of a certain bill brought in this court by this complainant against these defendants and Thomas H. Talbot, January 10, 1887. In that bill it is alleged that the matters in controversy between this complainant and Frederic A. Pike, respecting the ownership of these notes were submitted to the Hon. E. R. Hoar as arbitrator, that pending the submission, the said Pike died, having appointed his wife, Mary H. Pike, of Calais, Maine, executrix of his will and residuary legatee of all his estate; that Mrs. Pike appeared before the arbitrator at the hearings by her counsel Talbot; that the arbitrator, on November 30, 1886, delivered an award in writing which was favorable to the complainant. The bill further alleges as follows:

"That on the twenty-fourth day of December last, he (the complainant) was informed by the said Mary H. Pike, through her attorney and counsellor, the said E. B. Harvey, that she had through him and by a letter addressed to the arbitrator undertaken to revoke the power of said arbitrator under said submission, and to thereby annul or vacate the award made by him as aforesaid; and immediately upon receiving such

information he waited upon the said arbitrator through F. A. Brooks, his attorney, in company with Thomas H. Talbot, the attorney of the said Mary H. Pike, and the said Brooks received back from said arbitrator the award made by him as aforesaid, on the twentieth day of December, and the said Brooks and Talbot together received of said arbitrator the said two Swift notes and carried the same to John G. Stetson, Esq., to whom they intrusted the same, taking therefor his receipt in their joint names.

That on the fourth of January current, in order to entitle himself to the sole and exclusive possession of said Swift notes under the said award he paid the note of $2,437.50 running to C. H. Eaton, of Calais, in said award mentioned, to the said Thomas H. Talbot, and took and received from said Talbot the said Eaton note and now holds the same, by reason of which and of the award of the said arbitrator your orator became entitled to receive from the said Stetson the said Swift notes, and the said Mary H. Pike, executrix and residuary legatee under the will of the said F. A. Pike, deceased, and the said Talbot as her agent or attorney, ceased to have any right to or in said Swift notes, or either of them, or any right to demand or receive the possession thereof from the said Stetson, under the terms of the receipt of said Stetson therefor given on the twenty-fourth day of December last."

The prayer of the bill as amended is as follows:

"And your orator prays that the money so paid by the defendant, Swift, into the hands of the defendant, Stetson, as clerk of this court, in satisfaction of the said $15,000 note, may be remanded to the custody of said Stetson in his individual capacity, as if no such orders, as above recited, had been passed, and in the place and stead of the said $15,000 note, so surrendered by him, and filed with the papers in equity suit No. 2,170, in violation of the terms and provisions of the contract entered into by him with your orator as aforesaid, on the twenty-fourth day of December, 1886; and that the said Stetson may be ordered and decreed to pay over the proceeds of said note to your orator; and your orator prays for such other and further relief as he may be entitled to in the premises."

There is also a further prayer that, if the relief sought against Stetson be not granted, the defendant Swift may be ordered to pay the amount due on the said $15,000 note.

The defendants demur to the bill on several grounds; I shall only consider one of them, namely, defect of parties. Under the contract of bailment, it appears that the real parties in interest were the plaintiff and Mary H. Pike, executrix, and that the notes were to be held by Stetson subject to the joint order or direction of their attorneys, Talbot and Brooks, and dealt with as they may jointly direct. Admitting the allegations of fact stated in the bill to be true, but not the conclusions of law drawn therefrom, as I am bound to do by the demurrer, I am satisfied that the bill is fatally defective for want of necessary parties. These allegations do not make out a case which entitles a party claiming under the contract of bailment to dispense with the other parties interested therein. The contract with Stetson was not entered into until after the proceedings before the arbitrator had terminated, as appears by the bill, and the facts alleged respecting the arbitration and show the necessity of making Mrs. Pike a party to any proceeding respecting the Stetson receipt now sued upon. The receipt itself shows the necessity of making all those interested in any way parties to the bill. The defendant, according to the terms of this receipt, is liable to said Pike and Gregory jointly. By this bill Gregory claims certain rights under this receipt adverse to his co-obligee, and it follows that the co-obligee is a necessary party thereto. Again, by the terms of this receipt, the notes are held subject to the joint order of said Talbot and Brooks, and to be dealt with as they jointly direct. Under these circumstances, Stetson, as maker of this receipt, cannot recognize any claim to said notes which may be made by either Pike or Gregory, or both of them, but he holds the notes subject to the joint order and direction of both Talbot and Brooks. It seems to me that neither

Gregory, nor any other person can in equity set up and establish any claim by virtue of this receipt without making Brooks and Talbot parties. In other words, Gregory, Mrs. Pike, Talbot, Brooks, and Stetson, are necessary parties to any bill brought on the receipt setting up any claim of ownership or control over these notes.

The point is raised by the complainant that, Mrs. Pike being a non-resident, it is impossible to make her a party, and that, therefore, under Equity Rule 47 and § 737 of the Revised Statutes, the court may proceed to an adjudication between the parties properly before it. It seems to me, however, that the above mentioned parties to the agreement are so far necessary parties that Rule 47 and § 737, as construed by the Supreme Court, cannot apply to this case.

In *Mallow* v. *Hinde* 12 Wheat. 193, quoting from *Elmendorf* v. *Taylor*, 10 Wheat. 167, the court says:

"The rule which requires that all persons concerned in interest, however remotely, should be made parties to the suit, though applicable to most cases in the courts of the United States, is not applicable to all. In the exercise of its discretion, the court will require the plaintiff to do all in his power to bring every person in interest before the court. But, if the case may be *completely* decided as between the litigant parties, the circumstance that an interest exists in some other person whom the process of the court cannot reach, as if such party be a resident of some other State, ought not to prevent a decree upon its merits."

In *Shields* v. *Barrow*, 17 How. 139, the court points out three classes of parties to a bill in equity.

"They are: 1. Formal parties. 2. Persons having an interest in the controversy and who ought to be made parties, in order that the court may act on that rule which requires it to decide on and finally determine the entire controversy, and do complete justice by adjusting all the rights involved in it. These persons are commonly termed necessary parties; but, if their interests are separable from those of the

parties before the court, so that the court can proceed to a decree and do complete and final justice without affecting other parties not before the court, the latter are not indispensable parties. 3. Persons who not only have an interest in the controversy, but an interest of such a nature that a final decree cannot be made without either affecting that interest, or leaving the controversy in such a condition that its final termination may be wholly inconsistent with equity and good conscience."

The court further says:

"It remains true, notwithstanding the act of Congress and the 47th rule that a Circuit Court can make no decree affecting the rights of an absent person, and can make no decree between the parties before it, which so far involves or depends upon the rights of an absent person that complete and final justice cannot be done between the parties to the suit without affecting those rights."

In *Coiron et al.* v. *Mallaudon et al.*, 19 How. 113, it is held that the fact that such persons are beyond the jurisdiction of the court is not a sufficient reason for omitting to make them parties, because neither the act of Congress nor the 47th Equity Rule enables the Circuit Court to make a decree in a suit in the absence of a party whose rights must necessarily be affected by such decree. See also *Barney* v. *Baltimore City*, 6 Wall. 280.

Demurrers sustained.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1889.

CHARLES A. GREGORY, Appellant,
vs.
JOHN G. STETSON.
} No. 1514.

Stipulation.

It is agreed by the parties in the above-entitled cause, the appellant Gregory and the defendant Stetson, that said cause may be submitted on briefs or printed arguments, to be filed, in pursuance of Rule 20 of this Court, within the first ninety days of the term.

And the said Stetson, appellee, consents that the appellant may file a printed argument, and that the case may be submitted and heard by the Court on such printed argument for the appellant and the record in the case, including the opinion of the circuit court, without argument on his behalf, either orally or in writing.

F. A. BROOKS,
For Appellant.
JOHN G. STETSON, *Pro Se.*

[Endorsed:] Sup. Court. U. S. 1889, Oct'r term. No. 1514. Charles A. Gregory, app't, *vs.* John G. Stetson. Stipulation to submit under 20th rule.

[Stamped:] Office Supreme Court U. S. Filed Dec. 17, 1889. James H. McKenney, clerk.

Office Supreme Court U. S.
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JAMES H. McKENNEY,
CLERK.

SUPREME COURT OF THE UNITED STATES,

OCTOBER TERM, 1889.

No. 1514.

CHARLES A. GREGORY, *APPELLANT*,

v.

JOHN G. STETSON.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF MASSACHUSETTS.

ARGUMENT FOR APPELLANT

BY

F. A. BROOKS.

Supreme Court of the United States.

OCTOBER TERM, 1889.

No. 1514.

CHARLES A. GREGORY, *Appellant*,

v.

JOHN G. STETSON.

ARGUMENT FOR THE APPELLANT.

FACTS.

Two certain notes of hand, not negotiable, dated April 20, 1883, one of $15,000 and one of $20,334.60, were drawn or made by Wm. C. N. Swift, of New Bedford, Mass., payable to one Charles F. Jones. These notes were, on the fifth day of December, 1884, transferred and assigned by the payee Jones to the appellant Gregory (see Rec., p. 7, middle), but before such transfer they had been passed into the possession of one Frederic A. Pike, of Calais, Me., in whose possession they then were.

On the sixteenth day of December, 1884, the appellant brought his bill of complaint in the Supreme Court of the State of Massachusetts against the said Pike, to recover possession of said notes, claimed by him as his property. This suit was removed to the Circuit Court of the United States for the district of Massachusetts, and was there num-

bered 2170 of cases in equity. Issues were duly framed and proofs taken, and the said suit was set down in said court for final hearing. (Rec. p. 5, middle.)

Afterward, viz., on the thirtieth day of November, 1886, the appellant and the said Pike entered into an agreement to submit the controversy relating to the rightful possession of said Swift notes to the determination of E. R. Hoar, of Concord, Mass.

It was provided in and by said agreement of submission, that the notes should be placed in possession of the arbitrator and left in his possession to abide his award in the premises, and to be by him passed over to whichever of the two claimants, Pike or the appellant, should be found entitled thereto by him. (Rec., p. 10, top.)

It was also provided that in case of the death of either of said parties before the making or publication of the award, their respective assigns or legal representatives should be bound by the submission and award. (Rec., p. 10, middle. Rec., p. 5, bottom.)

The said Pike did decease before any award was made; but the executrix of his will, Mary H. Pike, prosecuted the submission before the arbitrator by counsel employed by her for that purpose as if she had been originally a party to the submission, until Dec. 20, 1886, the day of the making and publication of the award, and of the delivery thereof to the appellant. (Rec., p. 6, top.)

Mary H. Pike, the executrix, had been represented in the hearings before the arbitration after the decease of her husband, by Thomas H. Talbot, Esq., as her counsel, and the appellant by F. A. Brooks, as his counsel. Mrs. Pike was residuary legatee as well as executrix under her husband's

will, and E. B. Harvey, of Calais, Me., was her general counsel or legal adviser in the State of her residence.

On the twenty-fourth day of December, 1886, Mrs. Pike, through her attorney, Harvey, wrote a letter to the arbitrator for the purpose of revoking the agreement of submission, and of vacating or annulling his award.

Immediately after the receipt of information to that effect the appellant, by his attorney, Brooks, together with Talbot, the attorney of Mrs. Pike in prosecuting the submission, waited upon the arbitrator and received from him the two notes in question, and took them directly to the defendant, Stetson, and lodged them with him, obtaining from him a receipt therefor couched in the words following, viz. : —

"Boston, Dec. 24, 1886.

"Received of Thomas H. Talbot, Esq., as attorney for Mary H. Pike, executrix of Frederic A. Pike, and of Francis A. Brooks, Esq., as attorney of Charles A. Gregory, two notes of hand, made or signed by W. C. N. Swift, of New Bedford, dated April 20, 1883, one for $15,000 on two years' time, and one for $20,334.60 on three years' time, payable to Charles F. Jones. Said notes are to be held by me, subject to the joint order and direction of the said Talbot and Brooks, and dealt with as they may jointly direct."

(Rec., p. 11, Exhibit 3.)

By the terms of the award of the referee the appellant would not be entitled to possession of the two Swift notes until he should have paid off a certain other note of $2,437, and interest, then held by one Eaton, residing in Calais, Me., a distance several hundred miles from Boston.

The arbitrator desired to rid himself of the custody of

the Swift notes after receiving Mrs. Pike's letter of revocation, and the notes were thereupon taken from him and lodged with the defendant, Stetson, as above stated.

On the 4th of January, 1887, the appellant paid off the Eaton note, and by so doing became entitled, in pursuance of the award, to the immediate possession of the two Swift notes, and by the terms of the award, the said Mary H. Pike and her attorney, Talbot, thereupon ceased to have any right to said notes or the possession thereof as against the said Stetson. (Rec., p. 7, top.)

The $15,000 note in question was about to mature before the suit in equity, No. 2,170, above mentioned, for determining the rightful ownership of the two Swift notes as between Gregory and Pike, could be tried and decided.

Hence, on the twenty-sixth day of March, 1885, or about one month before the maturity of the $15,000 note, it was agreed between Gregory and Pike, in the event of said note not being paid at maturity, that an action at law should be brought thereon in the name of the payee, Jones, against Swift, the maker, and the note collected, and the proceeds paid over to whichever of the two should be found entitled to the same by the decision of the court in the equity suit; and Thomas H. Talbot was selected and mutually agreed upon by them as attorney to commence and prosecute the said action at law. (Rec., p. 14, top.)

This action at law on the $15,000 note was accordingly brought in the same Circuit Court, numbered 2,435, and prosecuted by said Talbot; the defendant Swift was defaulted, and Talbot, acting in the interest of Pike alone, was seeking to procure judgment therein, but was unable to do this because he could not produce the note and file the same

in court, as was necessary to be done in order to the entry of judgment, the computation of damages, and the issue of execution thereon.

At this stage of the action at law the appellant filed his petition for leave to intervene in said action at law and make claim to the note in suit, or the proceeds thereof, and to resist the said Talbot in his effort to control the action or come into possession of the proceeds of said note in the sole interest of the executrix of Pike deceased. (Rec., pps. 13 and 14.)

At the same time, June 13, 1887, the defendant Swift in said action at law No. 2,435, who had also been made a defendant in the equity suit of Gregory *v.* Pike, No. 2,170, filed his petition in said equity cause 2,170, praying that said Talbot and the plaintiff Jones and Pike's representative might be restrained from suing out or levying execution upon any judgment to be entered in said action at law No. 2,435; also praying that he be permitted to pay into court in said action at law the amount of judgment in the same, and that upon such payment being made the court would order satisfaction thereof to be entered of record; and also order the note $15,000 to be produced by said Talbot, and cancelled; and that thereupon the sum so paid into court by him in said action at law might be transferred to this present cause (meaning cause 2,170 in equity), there to remain until the final hearing, and then to be disposed of pursuant to a decree to be made in the said cause (2,170, equity). Rec., pp. 12 and 13, Ex. 4.)

Apart from the irregularity of filing a petition in an old equity cause for the disposal of an action at law on the law docket of the same court, it was not possible that this peti-

tion of Swift should be granted, because Talbot was not in possession of the $15,000 note, and could not produce the same to be filed in court as proposed. Consequently no action whatever was had on Swift's petition, but on the 21st of June (about a week later) another petition, entitled, as in said old equity cause, "No. 2,170," was filed by Mrs. Pike, as the executrix of her husband's will, in which she prayed that the appellee (Stetson) be ordered to file said note in said action at law (meaning action at law of Jones *v.* Swift, No. 2,435), in order that judgment might be properly entered in said action; and further prayed that if said Swift should pay the amount of said judgment into court, the same might be held by the court subject to the rights of all parties claiming said note, and abide the decision of this court in this cause (meaning the equity cause of Gregory *v.* Pike, *et al.*, No. 2170). (Rec., pp. 17 and 18.)

On the ninth day of July, 1887, an order was made and entered in the old equity cause of Gregory *v.* Pike, No. 2170; that Stetson (appellee) file the note of $15,000 . . . in the said action at law No. 2,435, of Jones *v.* Swift; thus upon the entry of judgment in the said action at law, the defendant Swift be directed to pay into the registry of the court the amount of said judgment . . . and that said amount be held subject to the rights of the parties claiming said note and to abide the decision of the court in this cause (meaning the old equity cause of Gregory *v.* Pike, No. 2,170). (Rec., p. 2, Rec. p. 18, bottom.)

In consequence of this order of the court, entered in the equity cause 2,170, the $15,000 note was delivered up and surrendered by Stetson, and filed with the papers in action at law 2,435 of Jones *v.* Swift, and judgment thereon was

entered in said action at law against Swift, and the amount of said judgment was paid by Swift to the clerk of the court, the same Stetson, defendant and appellee in this case, and he, the said Stetson, now claims to hold said sum subject to the rights of the parties as they may be made to appear upon the decision by the Circuit Court of the old equity cause 2,170, as provided and set forth in the order aforesaid, and not otherwise. (Rec., pages 2 bottom and 3 top.)

The plaintiff's bill charges that these orders were passed and proceedings had without the consent, against the will, and after the protest of Gregory (appellant) against them as being irregular, improper, contrary both to law and justice, and *without due process of law*. (Rec., page 3, near top.)

The bill also charges that the appellant had, prior to July 9, 1887 (the date of said order of court), become the lawful owner of said $15,000 note, and that said court and Swift and Stetson had been duly notified thereof. (Rec., p. 3, middle.)

The prayer of the bill, or the only part of it now relied on as material, is that the court may declare and decree that before July 9, 1887, the plaintiff (appellant) had been the lawful and sole owner of said $15,000 note, and that the defendant Stetson's possession of the said note at that time was that of a trustee holding for the use and benefit of the plaintiff alone, and that the plaintiff is entitled to said note, or the proceeds thereof when afterward converted into money (Rec.,

p. 22, middle), and further (Rec., p. 4, last three lines of prayer, as originally framed) that the said Stetson may be ordered and decreed to pay over the proceeds of said note to your orator.

[It is not claimed that the prayer for remanding the $15,000 note to the custody of Stetson could be properly granted on appeal to this court.]

The bill was dismissed by consent as against the defendant Swift. (Rec., p. 24.)

It was demurred to by the appellee, Stetson, upon numerous grounds, but none of all the causes of demurrer except the ninth were relied upon at the hearing, or considered by the court below (Rec., p. 32, top), and this demurrer was sustained, and the bill thereupon dismissed.

The ninth ground of demurrer taken by Stetson, and sustained, was in these words: —

"*That this bill is defective for want of parties, in that it does not make Mary H. Pike, executrix of Frederic A. Pike, Thomas H. Talbot and Francis A. Brooks, or either of them, parties thereto.*"

If this demurrer was improperly sustained, the decree dismissing the plaintiff's bill should be reversed, and a mandate should be issued to the court below to enter a decree for the amount of the $15,000 note, with interest ~~from~~ since the time of its surrender to the court by Stetson in July, 1887, that being the sum that came into Stetson's hands in his capacity of clerk of the Circuit Court, to whom the payment was made by Swift, as appears from the bottom line of the second page of the record in this case.

LAW.

This demurrer to the bill for defect of parties must be considered in two aspects.

Firstly, as to the law applicable to it, had the defendant Stetson continued in possession of the $15,000 note, and never parted with it in obedience to the order of court, passed July 9, 1887; and,

Secondly, as to the effect of that order, if any, in authorizing him to surrender that note and deliver it over to the clerk of the Circuit Court, to be filed in action at law No. 2,435, without the consent and against the caution and protest of the plaintiff.

I.

The old equity suit (2,170) of Gregory *v.* Pike had been brought as an amicable suit to determine between them as to the rightful ownership of two Swift notes, the $15,000 here in controversy being one of them. Pike, the defendant in that suit, was not a resident of Massachusetts, where the suit was brought, but had voluntarily submitted himself to the jurisdiction of the courts of that State to obtain an adjudication of this matter. The case had been got ready for hearing at much expense, when Pike became dangerously ill, and was not expected to live to see the case ended in due course of proceedings in court.

In the event of his death before rendition of judgment, it

party to get possession of the notes; and certainly to place no obstacles in the way of his getting them.

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I.

The old equity suit (2,170) of Gregory *v.* Pike had been brought as an amicable suit to determine between them as to the rightful ownership of two Swift notes, the $15,000 here in controversy being one of them. Pike, the defendant in that suit, was not a resident of Massachusetts, where the suit was brought, but had voluntarily submitted himself to the jurisdiction of the courts of that State to obtain an adjudication of this matter. The case had been got ready for hearing at much expense, when Pike became dangerously ill, and was not expected to live to see the case ended in due course of proceedings in court.

In the event of his death before rendition of judgment, it was understood that the suit would become abated, and all

benefit thereof lost. Under these circumstances the cause was taken out of court, and submitted to Judge Hoar as arbitrator upon the evidence already taken and printed for the use of the court. It was expressly provided in the submission that it should not be affected by the decease of either party thereto, and Judge Hoar was not only made arbitrator to decide the cause, but was placed in possession of the notes themselves as a stakeholder, and he was to pass over these notes to whichever of the claimants he as arbitrator should find to be entitled thereto. After he had decided that the plaintiff, Gregory, would be entitled to said notes upon payment by him of the Eaton note, and that the testator Pike was not entitled to them, his executrix, Mrs. Pike, undertook to repudiate the award in violation of the express provisions of the submission, that the parties thereto and their assigns and legal representatives would "observe, keep and perform" the said award, when made.

The letter of Mrs. Pike's counsel, conveying notice to the arbitrator of her intended revocation of the submission, contained no statement of any reason for such revocation; but we are led to suppose that she acted in this respect under the impression that the decease of either party to a submission before any award made operates of itself as a revocation. This effect was, however, prevented in the case, as we suppose, by the provision introduced into the submission for that purpose. (Rec., p. 10, middle.)

Blundell *v.* Brettargh, 17 Ves. 232.
Cooper *v.* Johnson, 2 B. & Ald. 394.
Prior *v.* Hembrow, 8 M. & W. 873.
McDougal *v.* Robertson, 4 Bing. 435.

If it should be held that Pike's death would operate to revoke the submission, notwithstanding the clause therein intended to prevent this result, we then submit that Mrs. Pike, as executrix of her husband's will, had power to submit claims against the estate to arbitration, and that her appearance before the arbitrator in pursuance of the submission, and prosecuting the same until the publication of the award, was the adoption by her of the old submission, and was equivalent in law to the execution by her of a new submission.

Bean *v.* Farnam, 6 Pick. (23 Mass.) 271.

The notice given to the arbitrator by Mrs Pike, through her attorney Harvey, Dec. 24, 1886, for the purpose of revoking the submission (Rec., p. 6, near bottom), of itself imports or implies the previous existence of a submission intended to be revoked by her.

Before the award had become effectual to confer on Gregory a right to the immediate possession of the two notes by reason of the Eaton note being outstanding, and in order that Judge Hoar, at his request, might be relieved of any further responsibility as a mere stakeholder, these notes were, by mutual consent transferred to and placed in the hands of the defendant Stetson as stakeholder in the place and stead of Judge Hoar, subject, however, as we respectfully submit, to all the equities which had become attached to said notes in the hands of Judge Hoar himself, by his award as arbitrator, unless that award was made invalid either by the previous decease of Pike or by the subsequent attempt of his executors to revoke the submission.

The substitution with the consent of Mrs. Pike herself of the defendant Stetson as holder of the notes in the place or stead of Judge Hoar, did not, we suppose, operate to release her as executrix from her obligation to keep and abide the award (if valid), or afford her any lawful excuse for objecting to the delivery of the notes to Gregory in pursuance of the award as soon as he should have taken up the Eaton note.

It is true that the receipt taken from Stetson at the time sets forth that the notes were to be held by him "subject to the *joint order and direction of the attorneys* (Talbot and Brooks) *of the two claimants*, Gregory and Mrs. Pike. (Rec., p. 11, bottom.)

But this language should be construed with reference to the fact that it was used by the parties who had bound themselves to each other (by their attorneys) to abide the award, and to do whatever was necessary to enable the successful party to get possession of the notes; and certainly to place no obstacles in the way of his getting them.

To hold that the mere substitution of Stetson as stakeholder in the place of Hoar, with the consent of Mrs. Pike, enabled her, as executrix, to eliminate from the submission the clause which authorized the arbitrator as stakeholder to pass over the notes to the successful party, would be to permit her to take advantage of her own wrong or to encourage or assist her in her attempt to break away from the submission, after she had availed herself of its expected benefits. She is estopped by the award from doing this.

Lloyd *v.* Barr, 11 Pa. St. 41.
Bigelow on Estoppel (4th ed.), p. 64, bottom.

We submit, therefore, in view of all the facts and circumstances of the case, it was not the intention of the receipt given by Stetson as stakeholder that neither party should be able to get possession of the notes, though successful before the arbitrator, unless he could procure the order or direction of the other, authorizing Stetson to give them up.

If this were so, then stakeholders could never be required to perform their duty or trust to the party entitled, without the concurrence or consent of both parties; or, in other words, the losing party could always prevent any delivery of the stakes except at the end of a law-suit.

Of course we do not claim that the stakeholder should not be free to decline to deliver over the stakes, so long as he has any reasonable doubt as to who is entitled to them. He is always at liberty, in the case of conflicting claims, to bring a bill of interpleader, and in that way get a decision of the court which shall bind all parties.

Mr. Chitty, in his treatise on the law of contracts, 11th

Am. Ed., p. 919, observes . . . "*a stakeholder is the agent of both parties*, or rather their trustee."

Applegate *v.* Colley, 10 Mees & W. 733.

The allegation of plaintiff's bill to the effect that the award of the arbitrator had conferred on plaintiff the right of possession of the $15,000 note (Rec., p. 7, top), and had operated to deprive Mrs. Pike of all right therein, and the further allegation that plaintiff before July 9, 1887, had become the lawful owner of said $15,000 note (Rec., p. 3, middle), must on demurrer to the bill be taken as true; and consequently the defendant, Stetson, cannot under his demurrer be permitted to say that it was necessary to join Mrs. Pike as a party on account of her interest in the $15,000 note, since, if these allegations are admitted as true, she had ceased to have any interest in the note.

II.

But even if it were otherwise, Mrs. Pike was beyond the jurisdiction of the court, and it was impossible for the plaintiff in this case to join her as a party defendant therein, and therefore it was not necessary for him to attempt to do so.

47th Rule of Equity Practice.
Williams *v.* Bankhead, 19 Wall. 571.
Van Bokkelm *v.* Cook, 5 Saw. 587.
(See U. S. Rev. Stats., § 737.)

The court below erred, as we respectfully submit, in holding as it did that the deposit of the notes with Stetson and his, Stetson's, receipt therefor to the depositors jointly created a contract between Stetson on one side, and Brooks

and Talbot *jointly* on the other side. The Court, in its opinion (Rec., p. 32, middle), refers to this contract as a "*contract of bailment*," and says; "The defendant, according to the terms of this receipt, is *liable to said Pike and Gregory jointly*" . . . "Under these circumstances, *Stetson* . . . cannot recognize any claim to said notes which may be made by either Pike or Gregory, or both of them, but he holds the notes subject to the joint order and direction of Talbot and Brooks. It seems to me that neither Gregory nor any other person can in equity set up and establish any claim by virtue of this receipt without making Brooks and Talbot parties."

Of course, if Brooks and Talbot were acting merely as the attorneys or agents of Gregory and Mrs. Pike respectively (as they in fact were), then they were not necessary parties to any suit against Stetson, even if the receipt embodied a joint contract made by Stetson with their principals; but we submit that by the deposit of the notes with Stetson under the circumstances, he became merely the holder of the notes as the agent for whichever of the two should prove to be entitled to them under the submission of the question of title to Judge Hoar, unless that submission should prove to have been effectually revoked by the action of Mrs. Pike taken on the same twenty-fourth day of December, 1886, only an hour or two before the notes were transferred from the custody of Judge Hoar to that of Stetson. If the award determined the title to the notes as between Gregory and Mrs. Pike, it also determined it as between Stetson and Mrs. Pike, and she had no claim for them as against Stetson, and he was not a necessary party to a suit by Gregory against Stetson to recover the notes.

III.

But if we are entirely wrong in our contention thus far, and if it was not legally competent for the plaintiff to maintain his bill against Stetson as stakeholder without joining Mrs. Pike, unless it is made to appear that Mrs. Pike had before suit ceased to have any lawful interest in the note; we submit that it does appear from the allegations of the bill (admitted by the demurrer), that before the commencement of plaintiff's suit Mrs. Pike had ceased to have any claim against Stetson, on account of the note lodged with him Dec. 24, 1886, and therefore was not a necessary party to this bill of complaint.

The very act of Stetson, complained of in plaintiff's bill and made the basis of plaintiff's claim in suit, viz., the surrender by him of the $15,000 note, was done in pursuance of the order of the Court of July 9, 1887, and this order was made upon the application or request and petition to the Court of Mrs. Pike herself. This petition is printed at the bottom of p. 17 of the Record, and recites the fact that Stetson had been intrusted with, or was in possession of, the $15,000 note. She (Mrs. Pike) then proceeds to pray (thirteenth line from top of p. 18) "that said Stetson be ordered to file said note in said action at law," . . . and that if Swift should pay the amount of said note into court, that the amount so paid into court might be held to abide the decision of this court in this cause, *i. e.*, the old equity cause 2,170; all this was ordered by the Court to be done, as prayed for in her petition, and was done. Rec., pp. 18, 19.

Under these circumstances, it cannot be pretended that Mrs. Pike, after having herself procured the surrender into court by Stetson of that note, and the violation of the terms of the bailment undertaken by him in the interest in part of the plaintiff, was still a necessary party to the legal determination of the question of Stetson's liability to Gregory for this violation of Gregory's rights.

IV.

There is, however, yet another phase of this demurrer which might perhaps be set up as justifying the court below in sustaining it and in dismissing the bill, although it does not appear to have been taken into consideration by that court; we refer to the eighth cause of demurrer assigned, as stated at the bottom of p. 16 of the record, in these words, "*that this bill seeks equitable relief against this defendant for acts done by this defendant as an officer of this court under the orders and decrees of this court, and for which this court, and not this defendant personally, is responsible.*"

Reference is here made to the order of court, passed July 6, 1887, in the *old equity cause* 2,170, which had been referred by the parties to Judge Hoar by a submission entered into Nov. 30, 1886, by which order the defendant (Stetson) was required to file the $15,000 note in the action at law (2,435) then pending thereon, in the name of Jones, and by which Swift, the defendant in said action at law (2,435) was directed to pay the amount of said note into court (as he did), and by which it was further ordered that the amount, when so paid into court, should be held subject to the rights of

the parties claiming said note, and to abide the decision to be made by the court thereon in the old equity cause 2,170. (Rec., pp. 18 and 19.)

It is obvious, if this order of the Circuit Court was lawful and binding upon the plaintiff Gregory, that Stetson was thereby relieved and discharged from the liability assumed by him Dec. 24, 1886, as stakeholder of said note previously held by Judge Hoar under the submission of Nov. 30, 1886.

We submit that this order of July 9, 1887, did not and could not operate to relieve Stetson from his liability as stakeholder, for several reasons.

Firstly, because the old equity cause of Gregory *v.* Pike had been taken out of court and discontinued by virtue or as a consequence of the submission of said suit to the decision of Judge Hoar as referee, Nov. 30, 1886, and so said old cause 2,170 had ceased to be subject to any further judicial action on the part of the court.

Draghicevich *v.* Vulicevitch, 78 Cal. 378.
Heslep *v.* San Francisco, 4 Cal. 1.

Secondly, if the old equity cause was not terminated by the reference of the same to arbitration, it became abated as to the defendant, Pike, by his decease soon after the submission (Rec., p. 5, fourth line from bottom), and after such abatement was not available to the deceased defendant or his executrix for the procurement of any orders of court therein. Both these points were taken and set forth in the plaintiff's

bill in this case (Rec., p. 3, third sentence from top), and the facts so shown were admitted by the demurrer of defendant, Stetson.

Thirdly, even if it were true that the old equity cause were still pending in the Circuit Court, and open for the consideration of all questions or issues originally presented by the pleadings therein, yet it is obvious that it was not open to the court for the purpose of making orders to have effect or operation in the action of Jones *v.* Swift (No. 2435), on the law side of the court, or for the transfer to it, 2170, of a fund paid into court in said action at law, so as to introduce into the old equity cause 2,170 for adjudication the new question as to which of the parties in 2,170, or either of them, the fund paid into court in action 2,435 (law) in July, 1887, really belonged. To do this would be not only to overlook all distinction between cases at law and in equity, but to mingle and confound the questions and issues presented by different cases between different parties brought at different times and for entirely different purposes.

Such an order seems to us to be an entire confusion of all distinction between the rules regulating judicial proceedings in courts of law and of equity respectively.

This order was passed on motion, in 2170, of Mrs. Pike without formal notice to Gregory, the plaintiff in that suit and, as we submit, without *due process of law* in any respect.

Smith *v.* Mason, 14 Wall. 419.
Marshal *v.* Knox, 16 Wall. 556.
Pennoyer *v.* Neff, 95 U. S. 714.
Walden *v.* Craig, 1 Peters, 154.
Watrous *v.* Johnson, 24 How. 195.
Wells on Jurisdiction, Chap. 11, § 82, and cases cited.

The Court will probably perceive that if this order of Court of July 9, 1887, were held valid and binding on plaintiff Gregory, and Stetson relieved thereby as stakeholder, the note having been paid and cancelled, and the old equity cause both discontinued and abated, and therefore not available to them as a place or forum for obtaining an adjudication of their right to the note, then Gregory's position would be quite hopeless.

For this reason the plaintiff asks for a decree against the defendant personally, as he is obliged to do, and will be very glad, after obtaining such decree, to co-operate with the defendant in obtaining such a modification, by the Circuit Court, of the order of July 9, 1886, as will save him (the defendant) from all personal loss.

Briefly, our contention in this case is, that after the plaintiff Gregory, by paying off the Eaton note, had become entitled to the possession of the $15,000 note then in Stetson's hands, and after Mrs. Pike by her petition to the court had procured the order of July 9, 1887, for the surrender of this note by Stetson in violation of the rights of Gregory, and after Stetson had complied with that order and had parted with the note in obedience to the request or petition of Mrs. Pike, thus lending his assistance to Mrs. Pike in her efforts to get possession of the note, he (Stetson) had taken a position in opposition to Gregory in this matter, so that he could not afterward bring a bill in equity to compel Gregory and Mrs. Pike to interplead as to their adverse claims to the note. If, then, Stetson was not in a position